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IN THE

Supreme Court of the United States

October Term, 1988

THE BOEING COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE PETITIONER

Michael C. Hallerud
THE BOEING COMPANY
7755 E. Marginal Way So.
Seattle, Washington 98108
(206) 655-0810

Attorney for Petitioner

John F. Aslin*
Jeffrey A. Hollingsworth
Nancy Williams
PERKINS COIE
1201 Third Avenue
Seattle, Washington 98101
(206) 328-4000

Attorneys for Petitioner and Counsel of Record (*)

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INTRODUCTION

The Equal Employment Opportunity Commission, represented in this Court by the Solicitor General, raises in its Brief in Opposition the new argument that The Boeing Company's Petition for Writ of Certiorari should be denied because the Ninth Circuit's decision below is "interlocutory." Brief of Respondent in Opposition, at 3 n.3. EEOC contends that if Boeing prevails at trial, "its arguments will become moot." *Id.* If Boeing loses at trial, EEOC argues, it can renew its argument in this Court. *Id.* Because this is a new argument, Boeing submits this Reply Brief pursuant to Supreme Court Rule 22.5.

ARGUMENT

The Ninth Circuit's decision is not "interlocutory" and the Solicitor General's argument otherwise is contrary to the well-settled rules of appealability. While the *denial* of a motion for summary judgment is generally an interlocutory order, the granting of such a motion, with judgment entered for the moving party, ends the proceedings and is immediately appealable. *See* C. Wright, A. Miller, M. Kane, *Federal Practice and Procedure* § 2715, at 626, 636 (1983).

The Solicitor General apparently contends, without citation to authority, that the summary judgment entered by the district court in this case somehow became interlocutory because the Ninth Circuit reversed. This argument is inconsistent, however, with this Court's 1986 trilogy of summary judgment decisions reaffirming the vitality of Civil Rule 56. *See Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986). In each of those cases the district court granted summary judgment, the court of appeals reversed, and this Court granted a writ of certiorari. Each summary judgment was ultimately reinstated. There was no suggestion that any of the courts of appeals' decisions was interlocutory.

Furthermore, the Solicitor General's argument would prevent any meaningful review of a key issue raised by Boeing's Petition: Whether *summary judgment* is appropriate in the particular circumstances of this case. As noted in Boeing's Petition, this case concerns the propriety of Boeing's reliance on the Federal Aviation Administration's age-60 rule to establish a bona fide occupational qualification ("BFOQ") for Boeing's pilots under the Age Discrimination and Employment Act. This Court, in *Western Airlines, Inc. v. Criswell*, 472 U.S. 400 (1985) and *Johnson v. Mayor & City Council of Baltimore*, 472 U.S. 353 (1985), held that the extent

to which the FAA rule is probative on the BFOQ question depends on the congruity between the occupational duties of a Boeing pilot and those of airline pilots to whom the rule formally applies. The district court, in applying *Criswell* and *Johnson*, held that the duties and responsibilities of commercial airline pilots and Boeing pilots were almost perfectly congruent and accordingly granted summary judgment.

The medical underpinnings of the FAA rule are a matter of undisputed historical record. Therefore, the appropriate issue from case to case is the level of congruity between the regulated and unregulated occupations. This determination can be made in the summary judgment context. The EEOC, however, appears intent on litigating in forum after forum the medical basis of the rule. *See, e.g., EEOC v. El Paso Natural Gas Co.*, 626 F. Supp. 182 (W.D. Tex. 1985). Private employers should not be required individually to reprove FAA's medical conclusions. Where the level of undisputed congruity is sufficiently high, summary judgment should be entered. The Solicitor General's new argument would force Boeing, and other employers, to try every case on the merits before obtaining review on the summary judgment issue. Such a rule is wasteful, inefficient, and inconsistent both with the purpose of Civil Rule 56 and this Court's *Celotex*, *Liberty Lobby*, and *Matsushita* decisions. Summary judgment is appropriate in this case and Boeing should not be required to expend the enormous resources required to reprove the medical basis of the FAA rule before obtaining review on this issue.

In sum, the Solicitor General's new argument is contrary to general rules of appealability and inconsistent with this Court's recent holdings affirming summary judgments. The Petition for Writ of Certiorari should be granted.

DATED this 23rd day of September, 1988.

Michael C. Hallerud
THE BOEING COMPANY

Attorney for Petitioner

John F. Aslin*
Jeffrey A. Hollingsworth
Nancy A. Williams
PERKINS COIE

Attorneys for Petitioner and Counsel of Record (*)